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SEP 10 1962
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1962

No. 426

DAVIS LEE, APPELLANT,

versus

W. I. PEEK, WILLA MAE PEEK, AND THE REV. E. N. BATES, APPELLEES

STATEMENT AS TO JURISDICTION

DAVIS LEE,
Petitioner.

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STATEMENT AS TO JURISDICTION

Appellant, Davis Lee, submits herewith his statement particularly disclosing the basis upon which this court has jurisdiction on appeal to review the final judgment of The Supreme Court of South Carolina in case No. 4824, opinion No. 17904, filed May 1st, 1962, affirming an order of the court of Common Pleas, Anderson County, S. C. This Appeal involves serious Constitutional questions.

THE OPINION BELOW

The opinion of The Supreme Court of South Carolina has been reported as *Lee v. Peek*, 125 S. E. (2d) 353, copies of the majority and dissenting opinions are attached hereto as Appendix A.

OPINION

BUSSEY, A. J.: This action for libel, wherein plaintiff seeks to recover damages in the amount of five million dollars, was commenced in the Court of Common Pleas for Abbeville County against the NAACP, the South Carolina Conference of NAACP Branches, the Anderson Branch of the NAACP, and six individuals who reside in Anderson County, including the three respondents here, process being served on May 25, 1959. The respondents promptly retained the services of H. C. Miller, an attorney at Anderson, who on May 28 filed a motion for change of venue to Anderson County, the notice commencing as follows: "You will take notice, reserving the right to answer of demur:". Before this motion could be heard, the NAACP had the cause removed to Federal Court and on July 2, 1959, attorney for respondents served and filed in the Federal District Court a motion to dismiss.

On October 19, 1959, the case was remanded to the State Court by the Federal District Court. On December 7, 1959, attorney for the respondents served and filed another motion for a change of venue to Anderson County. This motion, as well as motions of other defendants in the case for a change of venue, was heard by Judge Gregory on December 14, 1959, and at the hearing on the motions plaintiff presented Judge Gregory with an Affidavit of Default as to respondents. Judge Gregory took the motions under advisement and in an order dated October 28, 1960 granted a change of venue to Anderson County. Within twenty days

after Judge Gregory's order, the attorney for the respondents filed and served a demurrer.

The appellants then served a notice of motion for default judgment against respondents, dated December 27, 1960, returnable before the Hon. J. B. Pruitt, on the 7th day of January 1961. In response to this notice, the respondents filed with the judge an answer and reply to the motion of plaintiff for a default judgment accompanied by an affidavit of counsel. The answer and return set forth the history of the litigation. The affidavit of counsel is to the effect that he acted with due diligence and good faith to protect the rights and interests of his clients; that he believed the demurrer to be meritorious and that the defendants have a valid and meritorious defense.

Counsel's affidavit shows that he was under the erroneous impression that it was necessary for him to answer or demur in the State Court until the motion for change of venue had been decided, and that he was under the impression that the rights of his clients were fully protected when he, in the notices of motion for change of venue, reserved their right to answer or otherwise plead. Judge Pruitt heard the matter and in a well considered other denied the motion of the plaintiff for a default judgment and granted the respondents until the 18th day of January, 1961, in which to answer or demur to the complaint, as they might be advised. Within the extended time granted by Judge Pruitt, the respondents answered reserving their rights under their demurrer.

Judge Pruitt found as a matter of fact that counsel had misconceived the applicable procedural law and that the failure of the respondents to answer or demur in due time was a "consequence of their attorney's *bon fide* endeavors according to what he conceived to be the proper practice to serve the interest of his clients." Judge Pruitt

further concluded that respondents' counsel's mistaken procedure was, under all of the circumstances excusable and that it was in the furtherance of justice that the re-respondents be relieved of any default

The appeal here is from the order of Judge Pruitt, there being only one exception before this court, which is as follows:

> "Appellant takes exception to the order of Judge Pruitt and assigns his actions in giving an additional ten days to answer as an error and an abuse of discretion; that his action violated due process clause of The Federal Constitution in that he deprived appellant of the equal protection of the law by a Judicial Proceedings in which he went contrary to state law, and settled rules of legal Federal and State Procedures, to deny the relief sought which is guaranteed to all citizens by both Federal and State Law."

The entire language of the exception is vague, general and definitely not in compliance with Rule 4, Section 6, Rules of the South Carolina Supreme Court. To say the least, it is doubtful that the exception properly raises any question to be determined by this court. *Hewitt v. Reserve Life Insurance Company*, 235 S. C. 201, 110 S. E. (2d) 852. However, since respondents in their brief concede that the one exception does raise the question of whether the circuit judge abused his discretion in granting relief to the respondents, we shall consider that question alone, it being clear that no other issue is property before this court.

In considering this question it must be borne in mind that the motion before the circuit judge was not a motion pursuant to Section 10-1213 of the Code to be relieved from a judgment or order taken against the respondents as a result of mistake, inadvertence, surprise or excusable neglect, but was a motion pursuant to Section 10-609 of the Code,

made prior to a judgment of any kind, the language of the applicable statute being as follows:

> "The court may, in its discretion and upon such terms as may be just, allow an answer or reply to be made or other act to be done after the time limited by this Code or by an order enlarge such time."

Prior to the 1952 Code the contents of Code Sections 10-609 and 10-1213 were combined in one section of the Code (Section 495, Code of Laws 1942). In the former Code section what is now Section 10-609 was the first part thereof. Many cases have been before this court arising under the old Code section, as well as under the two sections as now codified. There are certain general principles that have been consistently applied by this court to cases or questions arising under both of these sections as now codified and both parts of the former Code section. With respect to both provisions, this court has consistently held that the discretion expressly vested in the circuit court will not be disturbed except in a case of clear abuse.

However, there is a very definite distinction between an application for relief under Section 10-609 and one under Section 10-1213. By the terms of the statute, a showing of mistake, inadvertence, surprise or excusable neglect is necessary for relief after judgment or order under the terms of Section 10-1213. Section 10-609 provides for relief before judgment or order and does not contain any language requiring such a showing as a prerequisite. In *Roberts et al. v. Drayton et al.*, 116 S. E. 744, 121 S. C. 124, it was held that the privilege extended by Section 10-609 was limited to procedure before judgment, and Mr. Justice Cothran recognized and pointed out the distinction between the first and second parts of the then Code section.

556, relief was sought under the portion of the Code section In the case of *White v. Coleman*, 17 S. E. 21, 38 S. C.

which is now Section 10-609, before judgment, and the circuit judge refused to allow the defendant to answer. This court held that the matter was entirely within the discretion of the circuit judge and that his order was not even appealable. This court said:

> "'Discretion' is defined to be 'a man's own judgment as to what is best in a given case as opposed to a rule governing all cases of a certain kind.' We are unable to see upon what principle we could proceed in considering that which in its very nature is in the breast of the circuit judge. The effort to consider such charges might only make a new way of appeal from that which under the law is declared to be unappealable. We suppose it is possible that there might be such a gross abuse of discretion as to demand relief, but happily such cases never occur, or certainly very rarely in the administration of our law."

In the case of *McDaniel v. Addison*, 53 S. C. 222, 31 S. E. 226, this court, with respect to the portion of the then Code section which is now Section 10-609, had the following to say:

> "It is manifest, therefore, from the express terms of the statute, that a motion of this character is addressed to the discretion of the circuit court, and not, therefore, ordinarily appealable. For as was said by the late Chief Justice Simpson, in *Truett v. Rains*, 17 S. C. 451, and quoted with approval in the very recent case of *Michalson v. Rountree* (51 S. C. 405), 29 S. E. 66, at page 67: 'As a general rule, where a court or judge is invested with power to be exercised at discretion, such power is absolute, and, when exercised, it is final. From the very meaning of the term and the nature of the power, discretion is unlimited. It is bounded by no rule except the good sense and integrity of the party empowered to exercise it, and, in the absence of an express right to appeal, it necessarily follows that its exercise is unappealable." While this, is, undoubtedly, the general rule, our cases, some of which

have been cited in the argument of counsel, recognize, at least, one exception, and that is where there has been an abuse of discretion. Of course, this court would not assume that any Circuit Judge has been guilty of abuse of discretion confided to him by law; and hence, whenever an appeal has been taken upon this ground the burden rests upon the appellant to show that there has been abuse of discretion."

The foregoing language is quoted with approval by this court in an opinion by Mr. Justice Moss in the recent case of *Ward v. Miller*, 95 S. E. (2d) 482, 230 S. C. 288.

In the case of *Bishop v. Jacobs*, 93 S. E. 243, 108 S. C. 49, this court, with respect to the statutory provision which is now Section 10-609, had the following to say:

"It is true the exercise of discretion by a judge does not mean the same thing as the exercise of his desire in a given case. It is true one judge might exercise one way, and another judge might exercise it another way, on the same state of facts. In the nature of the case, then, there must be a latitude in whwieh the judicial discretion may move; and that means a hard and fast rule for the excise of discretion cannot be stated. The lawmakers did not intend that parties shall be held down to the strict duty to answer within 20 days; they recognized human frailty and provided a way of escape in the event of an excusible default; so both statutes are operative, that which requires a party to answer in 20 days, and that which provides a way to excuse failure to do so, under proper circumstances."

In the recent case of *Simon v. Flowers*, 99 S. E. (2d) 391, 231 S. C. 545, speaking through Mr. Justice Legge, this court had the following to say, with respect to the provisions of Section 10-609:

"Discretionary power under this section is vested in the trial, not the appellate, court. In an appeal from such an order of the circuit court it is not our function, nor is it within our power, to substitute our judgment

for that of the circuit judge simply because we might have reached a different conclusion had we been in his place."

From the foregoing authorities it is clear that the discretion of the circuit judge under Section 10-1213 is definitely limited by the language thereof, while under Section 10-609, the discretion of the circuit judge is almost unlimited. This distinction between these two sections has not been mentioned or discussed in many opinions of this court simply because such distinction had no bearing on the decision of the particular cases.

While the discretion of the circuit judge under Section 10-609 is very broad, it is not totally unlimited, and the lower court has been held to have abused its discretion when its exercise thereof was controlled by an error of law. In *McSween v. Windham*, 57 S. E. 847, 77 S. C. 223, the decision of the lower court, refusing to allow an answer after time, was reversed on the ground that the judge was controlled by an error of law in the exercise of his discretion (*e. g.* the erroneous construction of a written instrument extending the time for answering).

In *McGhee v. One Chevrolet Sedan, etc.*, 109 S. E. (2d) 713, 235 S. C. 37, the county judge refused to allow the defendant to answer after twenty days, but before judgment. This court reversed, holding that Section 10-609 should be liberally construed in the furtherance of justice and to the end that cases be tried on the merits. The facts therein showed that there was a clear case of excusable neglect on the part of the defendant and this court held that the county judge had clearly abused his discretion in not permitting the defendant to answer after time.

No case has been cited by the parties or has come to the attention of the writer which is directly in point with the facts of this case. There are, however, two cases, both re-

ferred to in the order of the lower court, which are very nearly in point, the principal distinction being that motions for relief in those cases were made after judgment.

In *Johnson v. Finger*, 102 S. C. 354, 86 S. E. 673, defendant's counsel had erroneously thought that the pendency of a motion to make the complaint more definite and certain had extended the time for answering. The circuit judge vacated a default judgment and this court affirmed. In *Savage v. Cannon*, 204 S. C. 473, 30 S. E. (2d) 70, this court affirmed an order of the lower court setting aside a default judgment resulting from the erroneous belief on the part of counsel for the defendant that time for answering had been extended by his demand for an itemized statement of the plaintiff's account. Since there was no abuse of discretion on the part of the lower court in granting relief in those cases, after judgment, where the burden was upon the defendants to show "mistake, inadvertence, surprise or excusable neglect", the mistake on the part of counsel being a misconception as to the proper procedure, certainly, there was no abuse or discretion in this case where relief from the default was for the same, identical reason granted before judgment.

It may be well to point out that appellant was the one who set in motion the chain of events which gave rise to the procedural misconception on the part of respondents' counsel. A review of appellant's complaint shows that it is totally devoid of any allegation which would place the venue of this case properly in Abbeville County. He should not be heard to complain of the misconception of someone else as to the proper procedure herein.

There is nothing in the record before us to indicate that the circuit judge was controlled by any error of law in granting respondents' motion, nor is there any factual finding in his order which is without evidentiary support.

The appellant, in support of his position, cited the following cases: *Odom v. Burch*, 52 S. C. 305, 29 S. E. 726; *Washington v. Hesse*, 56 S. C. 28, 33 S. E. 787; *McMahon v. Pugh*, 62 S. C. 506, 40 S. E. 961; *Gadsden v. Home Fertilizer & Chemical Co.*, 89 S. C. 483, 72 S. E. 15; and *O'Neal v. Atlas Assur. Co. of London, England*, 168 S. C. 174, 167 S. E. 227.

Only a casual reading of these cases will show that none of them is in point with the instant case of the facts. Such of the cited cases as are at all applicable hold that this court will not interfere with the holding of the lower court except in a clear case of abuse of discretion. Hence, the cases cited by the appellant actually support the position of respondents.

It is, therefore, the conclusion of this court that the appeal herein is without merit and the order of the lower court should be affirmed.

Affirmed.

TAYLOR, C. J., MOSS and LEWIS, JJ., and LEGGE, ACTING ASSOCIATE JUSTICE, concur in result.

LEWIS, A. J., (concurring in result): I concur in the result of the opinion of Mr. Justice Bussey because the record fails to show an abuse of the discretion vested in the Court under the provisions of Section 10-609 of the 1952 Code of Laws, but I arrive at the conclusion on somewhat different grounds. Disagreement with the wide distinction apparently drawn between the basis for granting relief under Section 10-609 and Section 10-1213 necessitates a statement of the reason for my concurrence.

While some of the decisions cited in the opinion of Justice Bussey refer to the discretion of the court as unlimited, it is recognized that this is not entirely true, for the exercise of discretion under Section 10-609 may be reviewed by this Court upon a showing of a clear abuse there-

of. Of course, no hard and fast rule for the exercise of discretion can be stated, but the prior decisions of this Court afford some guide for its exercise in cases, as here, where application is made for relief under the foregoing section because of the neglect of an attorney in handling litigation for his client.

The discretion vested in the lower Court must be exercised within the meaning and scope of Section 10-609 as interpreted by this Court. Under this section, as heretofore applied, relief may be granted where the default is due to the excusable fault of the attorney. *Bishop v. Jacobs*, 108 S. C. 49, 93 S. E. 243. As stated in the *Bishop case*, the foregoing section "provided a way of escape in the event of an excusable default." Every neglect, mistake or inadvertence of counsel is not excusable. The case of *Simon v. Flowers*, 231 S. C. 545, 99 S. E. (2d) 391, 394 involved a motion for relief before judgment from the neglect of the attorney. Relief was denied in that case and the following principle was quoted with approval:

> "Although a wide discretion is vested in courts to set aside or vacate judgments because of the neglect, misconduct or inadvertence of counsel employed in the case, the general rule undoubtedly is that the neglect of the attorney is the neglect of the client, and that no mistake, inadvertence or neglect attributable to an attorney can be successfully used as a ground for relief, unless it would have been excusable if attributable to the client. The acts and omissions of the attorney in such case are those of the client."

The granting of relief from default has been held proper where the litigant promptly employed counsel, who took prompt steps to protect the interests of his client and diligently pursued a course which he conceived to be proper practice, but allowed his client to get in default through a mistake as to be the proper procedure. Such is the case

here. *McGhee v. One Chevrolet Sedan*, 235 S. C. 37, 109 S. E. (2d) 713; *Savage v. Cannon*, 204 S. C. 473, 30 S. E. (2d) 70; *Johnson v. Finger*, 102 S. C. 354, 36 S. E. 673; *McSween v. Windham*, 77 S. C. 223, 57 S. E. 847.

However, the mistake, inadvertence or neglect of counsel has been held insufficient grounds for relief where default results from inaction of counsel on behalf of the client or failure to exercise due diligence in the protection of the client's interest. *Strickland v. Rabon*, 234 S. C. 318, 107 S. E. (2d) 344; *Simon v. Flowers, supra*, 231 S. C. 545, 99 S. E. (2d) 391; *Poston v. State Highway Department*, 192 S. C. 137, 5 S. E. (2d) 729; *Hartford Fire Insurance Co. v. Sightler*, 131 S. C. 241, 127 S. E. 13; *Claussen v. Johnson*, 32 S. C. 86, 11 S. E. 209

While it is true that in all of the foregoing decisions and those cited in the opinion of Justice Bussey the Court recognized the broad discretion vested in the trial court under Section 10-609, the principle was also recognized that the area in which the judicial discretion might move under Section 10-609 was limited by the necessity of a finding of excusable neglect or fault. In the cited case of *Simon v. Flowers*, it was stated that the same principles govern our review of Circuit Court orders under Section 10-609 as under Section 10-1213, citing *Morgan v. State Farm Mutual Insurance Co.*, 229 S. C. 44, 91 S. E. (2d) 723. See also: *Ward v. Miller et al.*, 230 S. C. 288, 95 S. E. (2d) 482; *Holliday v. Holliday*, 235 S. C. 246, 111 S. E. (2d) 205. The showing of neglect without a proper excuse is insufficient under both Section 10-609 and 10-1213.

The record shows a meritorious defense to the action.

The order under appeal should be affirmed because the appellant has failed to show wherein the lower Court abused its discretion in holding that excusable fault had been shown.

TAYLOR, C. J., and MOSS, A. J., and LEGGE, ACTING ASSOCIATE JUSTICE, concur.

JURISDICTION

1. This is an Appeal from a decision of The Supreme Court of South Carolina affirming an order of Judge J. B. Pruitt of The Court of Common Pleas of Anderson County, S. C., entered under chapter 7, Article 3, section 10-609, 10-641 of The South Carolina Code of Laws, Section 10-1213, in which the lower court gave Appellees an additional 10 days to answer even though they had had 18 months to do so and had not answered.

2. The Supreme Court of South Carolina handed down its opinion on May 1, 1962. Appellant did not file a petition for a re-hearing because the decision was so biased, and the court had established an entirely new position to deprive this Appellant of the due process and equal protection clauses of The 14th Amendment to The Constitution, that he knew filing a petition would be a waste of time.

3 The Jurisdiction of this court upon appeal is conferred by 28 U. S. C. A., Section 1257 (2). Appellant challenges the validity of the order in the lower court and the decision of The Supreme Court of South Carolina on the grounds that he was denied the due process and equal protection guaranteed by The 14th Amendment to The Constitution in that he was denied in both courts and rights and privileges extended to others because he is not a member of the bar and because he is a Negro. Appellant challenges the rulings of both courts on the grounds that they were prejudicial and are discriminatory in that these rulings are repugnant to The Constitution and Statutes of The United States, and are contrary to the previous decisions handed down by the Supreme Court of South Carolina involving the same questions of procedure.

4. Cases believed to sustain the jurisdiction of this court on appeal include *Link v. Wabash Railroad Company* cited as 82 S. Ct. 1386 (1962). *Societe International, Etc. v. Rogers,* cited as 78 S. Ct. 1087 (1958); *Anderson National Bank v. Luckett,* 64 S. Ct. 599; *Kotch v. Board of River Port Pilot Com'rs.,* 67 S. Ct. 910; *Admson v. People of State of California,* 67 S. Ct. 1672.

5. A copy of the order of the Court of Common Pleas of Anderson County invoking South Carolina Code of Laws, Sections 10-609, 10-641 and 10-1213, the Statute involved within the meaning of 28 U. S. C. A. Section 1257 (2d) is attached hereto as Appendix B.

ORDER GRANTING LEAVE TO COMPLY WITH SEC. 10-641 OF THE CODE

This case is before me on the motion of the plaintiff Davis Lee, seeking to have the three defendants, W. I. Peek, Willa Mae Peek and Rev. E. N. Bates adjudged in default for their alleged failure to comply with Sec. 10-641 of the Code of Laws of S. C. in that they failed and neglected to file and serve their answers or Demurrer within time. The said three defendants through their counsel made due Return thereto in a verified and sworn to Answer and Reply, both of which were carefully reviewed and considered by me. It appears that this action was commenced in the Court of Common Pleas for Abbeville County notwithstanding the complaint shows that all individual defendants resided in Anderson County. The summons and complaint was served on these defendants on May 26, 1959, and within three days thereafter they employed counsel to represent them, who immediately instituted proceedings for a Change of Venue before the Resident Judge of the 8th Circuit who was then presiding at Laurens. However, before the matter was heard by Judge Griffith, attorneys

for the other defendants moved the case into the U. S. District Court at Greenville. Upon notice thereof Counsel for these three defendants promptly and within due time filed a Motion to Dismiss the claim of plaintiff and served plaintiff with a copy thereof. The matter remained in the jurisdiction of the Federal Court until October 19, 1959, when his Honor, Judge C. C. Wyche, ordered the case remanded to the Common Pleas Court of Abbeville. Immediately afterward Counsel for these three defendants again filed and served on plaintiff a renewal of their Motion for Change of Venue to this County. This motion was heard by the then presiding Judge, the Hon. George T. Gregory, who on December 12th, 1959, at Abbeville, heard the Motion and took the matter under advisement, filing his ORDER granting the Motion for Change of Venue of the case to this County on November 10th, 1960. Thereupon and within due time the Counsel for said three defendants filed with the Clerk of Court for Anderson County a Demurrer to the Complaint and served a copy thereof on the plaintiff, where the case now stands finally for trial, counsel for said defendants certifying to the merits thereof.

With all of its ramifications in and out of the State and Federal Courts over a period of 18 months it appears to me that Counsel for these three defendants was not only diligent and faithful in his efforts to protect the interests of his clients but was successful in having the case transferred to Anderson County now standing at the foot of a heavily congested Court Docket. From his affidavits counsel for these defendants has shown and I am satisfied thereby that he misconceived the ruling in the case of *Rosamond v. Lucas-Kidd Motor Co.*, 182 S. C. 331, 189 S. E. 641, which he says guided him throughout, promptly serving his Demurrer and filing it immediately following the filing of the record with Judge Gregory's ORDER of Transfer

with the Clerk of this Court. If there was any fault or neglect it certainly was on the part of counsel and not on his clients for which neglect I deem him excusable. The matter involved is one strictly of procedure. Counsel has shown by his affidavit that his clients have a meritorious defense to this action and demand of several million dollars and under the decisions of our Supreme Court I am required to give Section 10-609 of the Code a liberal construction and grant relief from default where it is shown, as here, that the defendants have a meritorious defense, but are in default in consequence of their attorney's bona fide endeavors according to what he conceived to be the proper practice to subserve the interests of his clients and that the trial of the case on its merits will not be materially delayed. I refer to:

McGhee v. One Chevrolet, 235 S. C. 37, 109 S. E. (2d) 673;
Johnson v. Finger, 102 S. C. 354, 86 S. E. 673;
Savage v. Cannon, 204 S. C. 473, 80 S. E. (2d) 70.

The last two cases were reviewed in *Morgan v. State Farm Ins. Co.*, 229 S. C. 44, 91 S. E. (2d) 723, "because in them the defendants employed counsel within the time for answering and counsel's mistakes caused the default".

I have carefully reviewed the entire record in this case and have heard argument of counsel for and against the motion, but under my findings from the verified Return and Answer and the Affidavit of Counsel for the three defendants, I am constrained to hold the Default complained of was due entirely to defendants' counsel's mistake in procedure, which, in all the circumstances, is excusable and in the exercise of my judicial discretion, the relief prayed for should be granted, in furtherance of justice.

Now, therefore, on Motion of H. C. Miller, attorney for the three named defendants, is

Ordered: That the defendants, W. I. Peek, Willa Mae Peek, and the Rev. E. N. Bates, be and they and each of them hereby are granted relief from default for their counsel's failure and neglect to Answer or Demur to the Complaint herein within the statutory limit under Section 10-641 of the Code of Laws of S. C., Vol. 1 (1952), and it is further

Ordered: That the said defendants, W. I. Peek, Willa Mae Peek and the Rev. E. N. Bates, be and that they and each of them (the said W. I. Peek since deceased by and through his Executrix, Willa Mae Peek), be and they and each of them are hereby granted until the 18th day of January, 1961, to Answer or to Demur to the Complaint as they may be advised, and it is so ordered.

Done this 18th day of January, 1961.

.....

Judge of the 10th Judicial Circuit at Chambers at Anderson, South Carolina.

QUESTIONS PRESENTED

1. Whether the court of Common Pleas of Anderson County and The Supreme Court of South Carolina can rule differently in the case of the Appellant because he is not a member of the bar and a Negro, and not violate his rights under the United States Constitution.

2. Whether the Supreme Court of South Carolina can admit that counsel for the Appellees made a mistake in procedure, and at the same time excuse the admitted mistake, reward him for it, and deprive the appellant of his rights under the due process and equal protection clauses of the Constitution.

3. Whether, as applied to Appellant, the order of the Court of Common Pleas of Anderson County, giving ap-

pellees 10 days in which to answer, and stating that Counsel was guilty of excusable neglect, is in direct conflict with decision of The South Carolina Supreme Court which declared that section 10-609 did not require excusable neglect as a condition or grounds for an extension of time to answer. Yet the Court of Common Pleas based its order on the grounds of excusable neglect which The South Carolina Supreme Court holds is not the proper interpretation of the Code. Counsel for Appellees admitted that he misunderstood the procedure. Has not the Appellant been deprived of the due process and equal protection clauses of The 14th Amendment to the Constitution?

4. Whether South Carolina Supreme Court erred when it quoted appellant's exception verbatim in its decision yet failed to rule on the constitutional questions raised. Appellant raised the constitutional question in his printed brief, and in his oral argument before the court, yet the court completely ignored the question.

5. Whether the South Carolina Supreme Court erred when it ruled that appellant "was the one who set in motion the chain of events which gave rise to the procedural misconception on the part of respondents' counsel". Respondents' counsel has been a member of the South Carolina bar for 50 years and the mere filing of a complaint should not result in a misconception of procedure when the South Carolina Code, section 10-641, states plainly "The only pleading on the part of the defendant is either a demurer or an answer. It must be served within twenty days after the service of the copy of the Complaint".

6. Whether the South Carolina Supreme Court erred when it declared in the same paragraph above that "A review of Appellant's complaint shows that it is totally devoid of any allegation which would place the venue of this case properly in Abbeville County. He should not be heard

to complain of the misconception of someone else as to the proper procedure".

A. Appellant filed his complaint for libel in Abbeville County because he named a national organization, a foreign corporation, as defendant, and under South Carolina Code, section 10-214 as decided by the South Carolina Supreme Court in *Elms v. Southern Power Co.*, 78 S. C. 323, 58 S. E. 809. A plaintiff may elect the county for action. In the case at bar the foreign corporation filed a removal petition in the Federal District Court on the grounds of diversity of citizenship, at the same time the corporation petitioned the Secretary of State of South Carolina for a certificate of Domestication which was granted. The District Court remanded the case to Abbeville for trial on the grounds that no federal question was involved.

B. Immediately the designated agent of the foreign corporation, now domesticated, filed a motion for a change of venue to Spartanburg County, claiming that city and county as the headquarters for the corporation. At the same time the six co-defendants, who reside in Anderson County, filed a motion for a change of venue to that county.

C. The Appellant also named as co-defendants all of the thirty-two branches of the foreign corporation which are not incorporated. He had reason to believe that there was a branch in Abbeville County and filed a motion asking for an order directing the designated agent in Spartanburg to submit a list of the counties in which there is a branch. This was done in an effort to determine if there was a defendant or defendants in the county of the action, but whether there was or not under section 10-214 the appellant had a right to bring the action in any county.

7. Whether the South Carolina Supreme Court erred in the above analysis, and does not the position taken by the court show that it was not fully and completely familiar

with all of the facts, and that because of this, its decision was not only prejudicial, but that it deprived the appellant of the due process and equal protection clauses of the 14th Amendment to the Constitution.

8. Whether the South Carolina Supreme Court, by applying the wrong meaning, by arriving at the wrong conclusion as to the appellant's right to bring his action where he chose under the circumstances, did not actually penalize him for doing what section 10-214 says that he had a right to do, and did not the misconception of the court deprive this appellant of the protection guaranteed by the due process and equal protection clauses?

STATEMENT OF THE CASE

1. The Appellant is a Negro, a Newspaper Publisher who lives in Anderson, S. C. He is nationally known because of his outspoken editorials dealing with the current race issue. He has opposed forced segregation and forced integration, has opposed pressure groups and agitators. His position has gotten him into hot water with Whites and Negroes.

2. In December, 1958, the NAACP attacked the appellant and branded him an "Uncle Tom", a stooge for the Southern White man. The item appeared in Negro newspapers throughout the nation. It had been initiated and inspired by six Negro officers of the NAACP in Anderson who entered into a conspiracy to destroy this appellant and put him out of business.

3. In February, 1959, this appellant filed a complaint for libel and conspiracy against the National NAACP and the six officers of the Anderson branch. The action was begun in Abbeville County.

4. The national office of the NAACP immediately assigned three of its top Negro lawyers in the state to defend

it. Three of the Anderson Co-defendants, W. I. Peek, Willa Mae Peek and the Rev. E. N. Bates, retained H. C. Miller, a White Attorney, to represent them.

5. The Sheriff of Anderson County made the mistake of failing to leave the summons with the complaint. The NAACP lawyers and H. C. Miller immediately filed a motion for a special appearance, before Common Pleas Judge Bruce Littlejohn who was presiding at Abbeville.

6. Judge Littlejohn dismissed the case because he lacked jurisdiction since no summons had been served. He directed this appellant to file the complaint over.

7. Before this appellant had time to file his new action, H. C. Miller, Counsel for W. I. Peek, brought suit against this appellant for $40,000.00 for malicious prosecution and abuse of the process.

8. Mr. Miller filed his action May 24, 1959, and this appellant filed this present action May 25, 1959. The Supreme Court of South Carolina states in the opening paragraph, "The respondents promptly retained the services of H. C. Miller". Mr. Miller had been representing the Peeks since February 1959—three months.

9. From the very outset this appellant received insults and abuse at the hands of Mr. Miller who hates Negroes, and especially intelligent ones.

10. One Judge set on appellant's affidavit of Default from December 14, 1959, until November, 1960. When the case was finally heard by Judge J. B. Pruitt on a renewed motion by the appellant, January, 1961, this appellant called the court's attention to Mr. Miller's insults and abuse. He refers to all Colored people as "Niggers" and "Darkies".

11. While the service fee is $2.00, appellant could never get a Deputy Sheriff to serve Mr. Miller for less than $5.00. They were all afraid of him and refused to serve him for the regular fee. This appellant served Mr. Miller

a total of 15 times. On one occasion appellant sent one of his employees to serve counsel for the appellees, and Mr. Miller met him at the front door of his home (his office is in his home) and shouted, "No Nigger comes to my front door, go to the back".

12. The employee returned the notice and it was served by a deputy sheriff for $5.00. At the next appearance before Judge J. B. Pruitt, Mr. Miller's friend and former lawyer partner, the appellant complained about this abuse, and the Judge ordered the appellant to shut up.

13. In October, 1961, appellant appeared before Judge J. B. Pruitt to settle the record appeal to the South Carolina Supreme Court, Mr. Miller was there and participated in the proceedings. A day or so later appellant received the following letter from Mrs. Frances H. Smith, Clerk of the South Carolina Supreme Court:

"Dear Sir:

We returned to The R. L. Bryan Company the fourteen (14) copies of the Transcript of Record they delivered in the above case. On August 24, 1961, at the request of Mr. H. C. Miller, of Anderson, I issued a certificate of no return in this matter, Under Rule 1 of this court a case cannot be docketed except by leave of the court, in cases where a certificate of no return has been issued".

14. On November 16, 1961, this appellant appeared before the Supreme Court of South Carolina and argued a motion for a right to appeal, and pointed out to the court that Mr. Miller had misled the Clerk of Court. At the end of his argument the justices got up to go and Mr. Miller rushed to this end of his argument the justices got up to go and Mr. Miller rushed to this appellant, called him a black so and so and threatened to strike him with a cane.

NEGRO PUBLISHER RECEIVES BITTER TIRADE IN COURT

A Negro Anderson segregationist publisher Tuesday received a bitter tirade in Supreme Court here.

A white attorney, representing the Negros' side, shook a crooked cane in Davis Lee's face after the Supreme Court justices left the room, and the hearing was over.

A shocked stunned band of spectators and court attaches listened to the blistering remarks Attorney H. C. Miller delivered to Lee. Miller stalked from the room in rage. Lee informed Chief Justice Claude A. Taylor of the outburst.

15. The following item appeared in the largest daily in the state.

16. On June 11, 1962, the Appellant filed Notice of Appeal to the United States Supreme Court with the clerk of the South Carolina Supreme Court. On the same date he sent a copy of the notice of appeal to Judge J. B. Pruitt with an acknowledgment of the notice of appeal by the clerk. The sheriff's department served Mr. Miller the same day for $5.00.

17. On Wednesday, June 13, 1962, three days after filing the notice of appeal, Judge J. B. Pruitt held a hearing on a motion by H. C. Miller to dismiss W. I. Peek, now deceased, from the present case on appeal, in an effort to block and prevent this appellant from appealing this cause to the United States Supreme Court.

18. Judge J. B. Pruitt went much further in his order of June 13, 1962 and declared: "The plaintiff, Davis Lee, made no appearance before me either in person or by counsel at the hearing June 13, 1962, and I consider his purported notice of appeal without merit, and not in conformity with Federal Statutory Procedure, and therefore, without legal effect, and I so hold".

ARGUMENT

1. It is elemental that both the court of Common Pleas and the South Carolina Supreme Court was obligated to see that this appellant did receive the same kind of treatment at the hand of opposing counsel that other citizens received.

2. It cannot be disputed that both courts denied this appellant the protection guaranteed under due process and equal protection clauses of the 14th Amendment. Judge J. B. Pruitt's order of June 13, 1962, when he decided for the United States Supreme Court that appellant's appeal is without merit, is conclusive proof that this appellant has been denied his right.

3. This appellant could not receive a just and impartial decision in either court when both courts refused to intervene to see that he receive the same consideration accorded other citizens, and particularly in view of the fact that this appellant appealed to both courts for protection.

4. In its ruling which affirmed the order of Judge Pruitt, the South Carolina Supreme Court departed from the majority of its earlier decisions in support of an order that was arbitrary, capricious, unreasonable, and one which deprived this appellant of due process and the equal protection guaranteed by the Constitution.

5. No matter how much authority this appellant offered in support of his position, he was not a member of the bar and neither court would rule in his favor against an old friend who had practiced before both courts for 50 years. There is not one case on record in South Carolina, where counsel representing the Respondents was in default for 18 months, and then a judge gave him 10 additional days to answer.

6. The old adage that justice is blind can aptly be applied to the case at bar.

CONCLUSION

Appellant respectfully suggest that this appeal brings before this court federal questions under the constitution that are far reaching and importtant, both in terms of legal principles and of practical impact upon the ordinary citizens of this nation, and particularly Negro citizens who are abused and insulted in our courts daily as this appellant experienced; and that enough has been said to demonstrate that the questions presented are so substantial as to require plenary consideration.

Respectfully submitted,

DAVIS LEE,
Appellant,
407 Butler Street,
Anderson South Carolina.

Dated September 4, 1962.

SUPREME COURT OF THE UNITED STATES

No. .....October Term, 1962

DAVIS LEE, APPELLANT,

versus

W. I. PEEK, *ET AL.*

ORDER

UPON CONSIDERATION of the application of the appellant,

IT IS ORDERED that the time to docket the appeal and to file the record in the above-entitled case be, and the same is hereby, extended to and including Sept. 10th, 1962.

(S) HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

Dated this 13th day of August, 1962.

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